Supreme Court, U.S.
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No. 95-1484

In The

Supreme Court of the United States

October Term, 1995

AMPHITHEATER PUBLIC SCHOOLS and UNIGARD INSURANCE COMPANY,

Petitioners,

vs.

FAITH AITKEN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

RESPONDENT'S BRIEF IN OPPOSITION

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49 pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to review a state court decision where the state court did not decide a federal question and where no federal question was seasonably presented in the state court?

2. If this Court has jurisdiction, should this Court exercise its discretion to grant a Writ of Certiorari where the criteria of Supreme Court Rule 10 have not been met, where the state court has not decided a federal question, and where the record below has not been adequately developed to address Petitioners' untimely raised federal questions?

3. Is the Due Process Clause of the Fourteenth Amendment violated where an insurance company and its insured, which have full actual notice of a legal action, fail to participate and be heard in the action and where the action merely affects their erroneous "unilateral expectancies" rather than their actual then-existing "property" rights?

LIST OF INTERESTED PARTIES

Petitioners are Unigard Insurance Company and Amphitheater School District.

Respondent is Faith Aitken. Gerald T. Barton is counsel of record for Respondent Faith Aitken. Robert Q. Hoyt also represents Faith Aitken.

No federal questions were raised, decided, "drawn in question" or "passed on" regarding the federal constitutionality of any Arizona statute. This Court, therefore, should not permit the State of Arizona to intervene for presentation of evidence or argument in this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	2
Reasons for Denying the Writ	7
I. This Court Lacks Jurisdiction to Consider the Petition.	7
A. The Arizona Supreme Court Decided this Case on an Adequate, Independent State Ground. No Federal Issue Was Decided Below.	7
B. Petitioners Did Not Raise a Federal Question Below.	8
C. Petitioners Have Failed to Establish a Basis for this Court's Jurisdiction.	9
II. This Court Should Not Exercise its Discretion to Review this Case Because the Criteria of Rule 10 Are Not Met, Because No Arizona Court Decided	

Contents

Page

a Federal Question, and Because Sound Reasons, Including an Insufficient Record Below, Militate Against Review. 12

III. Petitioners' Due Process Rights Were Not Violated. 14

A. Petitioners Had Actual Notice of the Third-Party Action and an Opportunity to Participate and Protect Their Interests. 16

B. Petitioners Were Not "Deprived" of "Property" Protected by the Due Process Clause. 19

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

American Surety v. Baldwin, 287 U.S. 156 (1932) 8, 9

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 17

Banker's Life and Casualty Company v. Crenshaw, 486 U.S. 71 (1988) 10, 11

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 8, 9

Contents

	Page
Board of Regents v. Roth, 408 U.S. 564 (1972)	19, 20
Cardinale v. Louisiana, 394 U.S. 437 (1969)	13
Chevron Chemical Company v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982)	17
Coleman v. Thompson, 501 U.S. 722 (1991), *reh. denied*, 501 U.S. 1277	8
Dietz v. General Electric, 169 Ariz. 504, 821 P.2d 166 (1991)	4, 9
Emblen v. Lincoln Land Company, 184 U.S. 660 (1902)	20
Fuentes v. Shevin, 407 U.S. 67 (1972)	17, 18
Grijalva v. Arizona State Compensation Fund, __Ariz.__, __P.2d__, 212 Ariz. Adv. Rep. 33 (Supreme Court No. CV-93-0329-PR, decided March 9, 1996)	14
Hanson v. Denckla, 357 U.S. 235 (1958)	8
Harris v. Reed, 485 U.S. 255 (1989)	10
Hathorn v. Lovorn, 457 U.S. 255 (1982)	10, 11
Heath v. Alabama, 474 U.S. 82 (1985)	12
Herndon v. Georgia, 295 U.S. 441 (1935)	8, 9

Contents

	Page
Illinois v. Gates, 462 U.S. 213 (1983)	7, 13
Jiminez v. Sears, Roebuck & Co., 183 Ariz. 399, 904 P.2d 861 (1995)	11
Johnson v. Radio Station WOW, 326 U.S. 120 (1944)	8
Logan v. Zimmermann Brush Company, 455 U.S. 422 (1982)	18, 19
Martinez v. California, 444 U.S. 277 (1980)	19
Michigan v. Long, 463 U.S. 1032 (1983)	10
Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983)	19
Sperry and Hutchinson v. Rhodes, 220 U.S. 502 (1911)	20
State ex rel. Industrial Commission v. Pressley, 74 Ariz. 412, 250 P.2d 992 (1952)	17
State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P.2d 1001 (1952)	17
Street v. New York, 394 U.S. 576 (1969)	7, 8, 9
Tracy v. Ginzberg, 205 U.S. 170 (1907)	21
United Pacific/Reliance Insurance v. Kelley, 127 Ariz. 87, 618 P.2d 257 (App. 1980)	17

Contents

Page

Webb v. Webb, 451 U.S. 493 (1981) 7, 8, 13

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 20

Weinco, Inc. v. Katahn Associates Inc., 965 F.2d 565 (7th Cir. 1992) 18

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

Statutes Cited:

A.R.S. § 12-2506 ..... 4, 15, 19, 20, 21

A.R.S. § 23-1023 ..... 3, 4, 13, 15, 16, 20, 21

28 U.S.C. § 1257 ..... i, 1, 7

United States Constitution Cited:

Fifth Amendment 6, 10, 11

Fourteenth Amendment ..... i, 6, 10

Rules Cited:

Arizona Rule of Civil Appellate Procedure 22 ..... 6, 9, 11

Supreme Court Rule 10 ..... i, 12

Supreme Court Rule 14(1)(g)(i) 14

Contents

Page

APPENDIX

Appendix A — Portions of Transcript of Hearing Before Industrial Commission of Arizona on May 18, 1989 (Pages 1-2, 45-47) 1a

Appendix B — Respondent Faith Aitken's Notice Regarding Third-Party Action, Dated November 22, 1989, and Filed in the Industrial Commission of Arizona November 29, 1989 ..... 6a

Appendix C — Respondent Faith Aitken's Opening Brief in the Arizona Court of Appeals, Dated December 16, 1991, Statement of Issues Presented, Page 4 ..... 7a

Appendix D — Petitioners Amphitheater and Unigard's Answering Brief in the Arizona Court of Appeals, Dated March 14, 1992, Statement of Issues Presented for Review, Page 1 ..... 11a

Appendix E — Petitioners Amphitheater and Unigard's Response to Petition for Review in the Supreme Court of Arizona, Dated July 15, 1992, Statement of Issues Presented for Review, Page 2 ..... 14a

Appendix F — Order of Supreme Court of Arizona Granting Review on Issues 1 and 2 Only and Setting Case for Oral Argument Dated January 13, 1992 .... 17a

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Supreme Court of Arizona. That opinion is reported at 183 Ariz. 387, 904 P.2d 456 (1995), *vacating* 173 Ariz. 300, 842 P.2d 1313, *petition for cert. filed*, __ U.S.L.W. __ (U.S. March 15, 1996) (No. 95-1484).

The opinion of the Arizona Court of Appeals was filed May 14, 1992, and is reported at 173 Ariz. 300, 842 P.2d 1313, *vacated* at 183 Ariz. 387, 904 P.2d 456 (1995).

The Findings and Award of the Administrative Law Judge of the Industrial Commission of Arizona were issued on May 8, 1991, and were affirmed by that Judge on August 6, 1991. The Findings and Award are unreported.

The Appendix to the Petition for Writ of Certiorari includes the text of the Supreme Court of Arizona's opinion ("Appendix A"), the Arizona Court of Appeal's opinion ("Appendix B"), the Findings and Award of the Administrative Law Judge ("Appendix D"), and the Administrative Law Judge's Order affirming his own findings ("Appendix C"). For the convenience of the Court, pertinent portions of these opinions shall be referred to by the page number in Petitioner's Appendix (referred to as "Pet. App. p. __.").

STATEMENT OF JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257. No Arizona appellate court described, discussed or decided a federal issue. The questions presented for review in the Petition were never timely raised in the Arizona courts. Even if the Court determines that it has jurisdiction, this Court should not exercise that jurisdiction. (*See* pp. 7-14, *infra.*)

STATEMENT OF THE CASE

Petitioners' Statement of the Case is materially incomplete. Therefore, Respondent presents her own Statement of the Case.

Respondent Faith Aitken was employed as a custodian by Petitioner Amphitheater School District, which was insured for worker's compensation by Petitioner Unigard Insurance Company. Respondent was very seriously injured in a workplace accident on May 18, 1988. The next day, Respondent filed a worker's compensation claim form which indicated that a third party construction company had contributed to the injury. Under Arizona law, Respondent's employment status precluded her from suing her employer, but permitted her to maintain a separate action ("the third-party action") against the construction company, Maya Construction.

Respondent received benefits pursuant to her worker's compensation claim. Respondent also filed a third-party action against Maya Construction. The worker's compensation claim in the Industrial Commission of Arizona and the third-party claim in Arizona state court proceeded simultaneously. During the worker's compensation proceedings, Respondent's continued eligibility for worker's compensation benefits was contested. At a hearing on May 18, 1989, before the Industrial Commission, a treating psychologist for Respondent testified regarding Respondent's continuing injury. On cross-examination, counsel for the insurance carrier (who is also counsel of record for the same Petitioners before this Court) questioned the treating psychologist regarding the third-party action and whether it evidenced a motive of "secondary gain" on Respondent's part. (*See* Appendix A, Transcript of ICA Hearing, at 1a-5a.) Counsel's questions reveal that both Petitioners in fact knew of the third-party action approximately 11 months before the third-party case was actually tried. On November 29, 1989,

Respondent filed in the Industrial Commission of Arizona a formal notice of her third-party claim against Maya. That filing gave Petitioners further formal notice of the third-party action. (*See* Appendix B, Notice of Third-Party Action, at 6a.) Although Petitioners had both actual and formal legal notice of the third-party action, Petitioners did not participate in that action to protect their interests.

The third-party action against Maya Construction was tried in April, 1990. (The case was tried under comparative fault/several liability law, a statutory scheme which became effective in Arizona in 1988.) The jury returned a verdict and judgment was entered, as described in the Petition. The jury assessed total damages of $319,292 and apportioned fault among Maya Construction (65%), Respondent's employer (25%), and Respondent herself (10%). As a result of the apportionment of fault, Respondent recovered only 65% ($297,350) of her total damages. Respondent did *not* recover an additional $79,823 in damages because her actual recovery was reduced for the 25% fault attributable to her employer, Petitioner Amphitheater.

Despite the damage reduction of $79,823, Respondent, pursuant to A.R.S. § 23-1023, reimbursed Petitioner Unigard Insurance, her employer's worker's compensation carrier, the full amount of worker's compensation benefits which it had paid ($28,929.70). Respondent, however, contested the amount of that repayment and any future credit as erroneous and violative of Respondent's state constitutional rights. The question of the proper amount of reimbursement and future credit was presented to the Industrial Commission which determined that Petitioners were entitled to full reimbursement. Respondent then appealed to the Arizona Court of Appeals.

While the appeal was pending before the Arizona Court of Appeals and before any briefs were filed, the Supreme Court of

Arizona on November 21, 1991, decided *Dietz v. General Electric*, 169 Ariz. 504, 821 P.2d 166 (1991). *Dietz* determined that under Arizona's comparative negligence/several liability statute (A.R.S. § 12-2506), it was permissible for a third party (like Maya Construction) to name an employer (like Amphitheater School District) as a non-party at fault to which the jury could attribute fault, thereby reducing an injured worker's recoverable damages. *Dietz* recognized that in such a case an inequity would result if the injured worker (like Respondent) were required under A.R.S. § 23-1023 to repay the full amount of the worker's compensation benefits. *Dietz* clearly suggested that the solution to this inequity lay in the reduction of the payback to the worker's compensation carrier. When *Dietz* was decided, the parties immediately stipulated on November 22, 1995, to extend the time for filing briefs in the Court of Appeals. The stipulation expressly recognized that the *Dietz* decision "will have a direct impact on the arguments presented in this case."

Respondent filed her Opening Brief in the Arizona Court of Appeals on December 16, 1991. Respondent requested that the Court of Appeals grant exactly the relief which had been described in *Dietz*: namely, that there be a right of reimbursement to a worker's compensation carrier only to the extent that it had paid worker's compensation benefits in excess of the damage reduction for fault attributable to an employer. (*See* Appendix C, Respondent's Opening Brief in Arizona Court of Appeals, "Issues Presented", at pp. 7a-10a.) Petitioners filed their Answering Brief on February 14, 1992. The Answering Brief "acquiesced in (Respondent's) statement of the issues on appeal". It raised no issue of violation of federal constitutional rights if the court followed the *Dietz* principle. (*See* Appendix D, Petitioners' Answering Brief in Arizona Court of Appeals, p. 1, "Issues Presented for Review", at pp. 11a-13a.) The Court of Appeals ruled for Petitioners. Its opinion neither addressed nor

decided any issue arising under the United States Constitution. (*See* Pet. App. pp. A-17 to A-25.)

On June 15, 1992, Respondent filed a Petition for Review to the Supreme Court of Arizona. Petitioners responded on July 15, 1992. The response raised no federal constitutional arguments. (*See* Appendix E, Petitioners' Response to Petition for Review, at pp. 14a-16a.) The Arizona Supreme Court granted review on January 13, 1993. The order granting review specifically identified the issues which the Supreme Court of Arizona would consider. No federal issues were identified. (*See* Appendix F, Order granting review, at pp. 17a-18a.) Two Amici, the Southern Arizona Worker's Compensation Claimants' Attorneys Association and the Arizona Trial Lawyer's Association, subsequently filed Amicus briefs. Petitioners responded to those briefs but raised no federal constitutional issues. Before the Arizona Supreme Court issued its opinion, Petitioners never filed a request that the Supreme Court of Arizona hear argument, permit supplemental briefing, or in any way entertain or consider federal constitutional issues. The court heard oral argument on June 2, 1993.

On October 17, 1995, the Supreme Court of Arizona issued its opinion in *Aitken* (Pet. App., pp. A-1 - A-16.) As pertinent to this Petition for Certiorari, the *Aitken* opinion establishes:

1. That the Supreme Court of Arizona decided *Aitken* purely on the basis of Arizona state law. (Pet. App., pp. A-1 - A-16.)

2. That the court applied rules of statutory construction and interpreted Arizona statutes in a manner which avoided a decision regarding Arizona *state* constitutional issues. (Pet. App., pp. A-5 - A-6.)

3. That the court did not describe, discuss or decide any *federal* issues. (Pet. App., pp. A-1 - A-16.)

4. That the court specifically discussed its 1991 decision in *Dietz v. General Electric*, 169 Ariz. 504, 821 P.2d 166 (1991), analyzing the facts and law in precisely the manner which *Dietz* had foreshadowed, citing the same authorities, and reaching the same result which had been anticipated four years earlier in *Dietz*. (Pet. App., pp. A-6 - A-10.)

The Supreme Court of Arizona ruled for Respondent, vacated the Court of Appeals decision and remanded the case to the Industrial Commission of Arizona.

On October 31, 1995, Petitioners filed a Motion for Reconsideration pursuant to Rule 22, Arizona Rules of Civil Appellate Procedure, which permits reconsideration only in narrowly defined instances where the opinion of the appellate court should be changed because of an error of fact or law. ARCAP, Rule 22 and Co. ments (*See* Pet. App., pp. A-50 - A-52.) Despite Rule 22's express limitation, the Motion for Reconsideration raised federal constitutional issues for the first time. The motion contended that the *Aitken* decision violated Petitioners' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. On November 17, 1995, Petitioners supplemented their motion to add a claim of violation of the "takings clause" of the Fifth Amendment. Respondent answered, specifically arguing, among other things, that Rule 22 precluded the newly raised federal constitutional claims which had never previously been raised or decided. The Supreme Court of Arizona denied the Motion for Reconsideration without opinion on December 19, 1995.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION.

28 U.S.C. § 1257 describes the jurisdiction of the Supreme Court of the United States to review state court judgments. That section limits this Court's review to cases where a federal right is "drawn in question." This Court may review cases only when a federal question was raised and necessarily decided. *Street v. New York*, 394 U.S. 576, 581-82 (1969).[1]

A. The Arizona Supreme Court Decided this Case on an Adequate, Independent State Ground. No Federal Issue Was Decided Below.

The Supreme Court of Arizona decided this case on the basis of statutory construction of two Arizona statutes. The case presented purely state questions. The court's opinion refers to no federal questions. The Supreme Court of Arizona not only did not decide federal constitutional questions, but it also expressly avoided addressing even *state* constitutional issues. (Pet. App., pp. A-5 - A-6.) This Court need only look to the language of the opinion to determine that no federal question was decided. *See Illinois v. Gates*, 462 U.S. 213, 220-221 (1983); *Webb v. Webb*, 451 U.S. 493, 495 (1981). Since the Supreme Court of Arizona did not decide a federal question and since its decision rests on independent and adequate state grounds, this Court lacks

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1. Respondent submits that 28 U.S.C. § 1257 is a limitation on this Court's jurisdiction. This Court has discussed, but not decided, whether limitations on its review of state court decisions is "jurisdictional" or merely "prudential." *See e.g., Illinois v. Gates*, 462 U.S. 213, 218-222 (1983). In either event, the result is the same: this Court should not consider this case.

jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *reh. denied*, 501 U.S. 1277.

B. Petitioners Did Not Raise a Federal Question Below.

Petitioners raised no federal constitutional question until they filed their Motion for Reconsideration *after* the Supreme Court of Arizona had issued its opinion. In *Herndon v. Georgia*, this Court stated:

> The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.

295 U.S. 441, 443 (1935).

Here, the Supreme Court of Arizona did *not* decide any federal question. This Court has consistently held under facts identical to the present case — where the highest state court issues its opinion, where a party then files a motion for rehearing raising federal constitutional issues for the first time, and where the state court denies the motion without opinion — that the constitutional issues have not been timely or seasonably raised below and cannot be considered by this Court. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Hanson v. Denckla*, 357 U.S. 235, 243 (1958); *Johnson v. Radio Station WOW*, 326 U.S. 120, 128-29 (1944); *American Surety v. Baldwin*, 287 U.S. 156, 162-63 (1932). Where no federal question is raised below, this Court lacks jurisdiction to consider the question. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Webb v. Webb*, 451 U.S. 493, 495 (1981); and *Street v.*

New York, 394 U.S. 576, 581-82 (1969).[2]

Petitioners, however, seem to argue that the Supreme Court of Arizona's failure to address constitutional issues raised by their Motion for Reconsideration somehow constituted an "implicit" adverse ruling on the federal claim. Petitioners are wrong. The Arizona court's silence on the late-raised constitutional issues is presumed to result from a deficiency in Petitioners' presentation of those issues to the Arizona courts. *Board of Directors of Rotary International*, *supra*, 481 U.S. at 550; *Webb*, *supra*, 451 U.S. at 495; *Street*, *supra*, 394 U.S. at 582. Here, Petitioners failed to raise any federal constitutional issue until they filed their Motion for Reconsideration, which, under Rule 22, Arizona Rules of Civil Appellate Procedure, prohibited new and different issues (such as federal constitutional issues) from being raised for the first time. For these reasons, this Court lacks jurisdiction to review this case.

C. Petitioners Have Failed to Establish a Basis for this Court's Jurisdiction.

Petitioners argue that their post-opinion Motion for Reconsideration sufficiently raised federal constitutional issues and that the Supreme Court of Arizona's denial of that motion

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2. An exception to this rule exists where the state court decision construes a statute in an unanticipated way which results in a constitutional violation. *Herndon*, *supra*, 295 U.S. at 441; *American Surety*, *supra*, 287 U.S. at 164. The exception does not apply in this case because the Supreme Court of Arizona's opinion in *Dietz v. General Electric*, 169 Ariz. 504, 821 P.2d 166 (1991), not only anticipated *Aitken's* holding, but also contained the same analysis and cited the same authorities. Therefore, Petitioners were required to raise their federal constitutional issues *before* the Supreme Court of Arizona decided *Aitken*. See *Herndon*, 295 U.S. at 445-46 (where prior decision includes same ruling, similar ruling must be anticipated and party must raise issue before rehearing). The *Aitken* opinion itself recognizes how *Dietz* anticipated the *Aitken* decision. (*See* Pet. App., pp. A-6 - A-10.)

without opinion somehow constituted a decision on the merits of the federal claim. Petitioners are wrong on both counts. First, Petitioners rely on *Harris v. Reed*, 485 U.S. 255 (1989) and *Michigan v. Long*, 463 U.S. 1032 (1983) for the proposition that an adequate and independent state ground of decision is present only if the state court made a "plain statement" that its decision was based on state grounds. This "plain statement rule" arises, however, only in cases where the state court has decided *both* state and federal questions, thereby requiring a "plain statement" from the state court to explain the basis for its decision. In this case, the Supreme Court of Arizona decided only state law questions. No federal issue was described, discussed or decided. Therefore, the "plain statement rule" does not apply.

Secondly, Petitioners wrongly rely on *Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988) and *Hathorn v. Lovorn*, 457 U.S. 255 (1982), for the proposition that federal questions raised for the first time in a post-opinion motion are timely and sufficient so long as they identify a specific constitutional provision at issue. In *Hathorn*, however, it appears that the state court had actually addressed a federal question below. 457 U.S. at 261. The Supreme Court of Arizona's opinion, in contrast, was premised purely on state statutory law and avoided even *state* constitutional questions. Further, Petitioners' Motion for Reconsideration did not meet the "specificity requirements" of *Banker's Life*. Petitioners' original Motion for Reconsideration referred only to a taking "without due process, violating (Petitioners') rights under the Fifth and Fourteenth Amendments to the Constitution of the United States." Their Supplement to that Motion advanced the "takings clause" of the Fifth Amendment. Petitioners' Motion for Reconsideration below and their Petition for Writ of Certiorari in this Court refer to cases which involve "takings" by the United States Government, substantive due process, and procedural due process. Those cases and theories are "thrown

together" without a clear articulation of the constitutional clauses which were violated or the manner in which such violation occurred in this case. Even at the time of responding to this Petition, it is unclear whether Petitioners contend solely that procedural due process was violated, or also that substantive due process and the Fifth Amendment "takings clause" as incorporated through the Fourteenth Amendment were violated, or that all of those constitutional violations occurred. *Banker's Life* requires specificity and clarity in the articulation of constitutional claims. 486 U.S. at 77-80. Petitioners do not satisfy *Banker's Life* standards.

Thirdly, Petitioners rely on *Banker's Life* and *Hathorn* to argue that an inconsistently applied procedural rule cannot form the basis for denial of federal constitutional rights. But the Supreme Court of Arizona has consistently followed Rule 22, Arizona Rules of Civil Appellate Procedure, to *not* consider *new* issues raised in a motion for reconsideration after an opinion has issued. Petitioners have cited no Arizona decision (and indeed no such authority exists) where the Supreme Court of Arizona considered such late raised issues or modified an opinion based on such issues. Unlike the state courts in *Banker's Life* and *Hathorn*, Arizona courts have consistently refused to consider *all* new post-opinion issues, including federal constitutional issues. *See Jiminez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 396-97, 904 P.2d 861, 868-69, n.9 (1995) (new issues on appeal permitted only as "rare exception"; *no* Arizona authority cited for considering new issue raised for first time *after* opinion issued.)

Finally, the only facts in the record below establish that Petitioners had actual notice of the third-party action and attempted to reduce Respondent's worker's compensation recovery by attacking her credibility because she had filed the third-party action. The undisputed law in Arizona is that

Petitioners could have intervened in the third-party action to protect their interests. The *uncontested* facts and law below establish that Petitioners had both notice of the third-party action and an opportunity to be heard. (*See* pp. 16-19, *infra.*) Instead of intervening in the third-party action, however, Petitioners did nothing. Thus, to the extent that Petitioners' constitutional claim advances a procedural due process theory, it must be rejected on a jurisdictional basis. This Court should not engage in speculation when *no* facts in the record below support Petitioners' constitutional argument.

II.

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THIS CASE BECAUSE THE CRITERIA OF RULE 10 ARE NOT MET, BECAUSE NO ARIZONA COURT DECIDED A FEDERAL QUESTION, AND BECAUSE SOUND REASONS, INCLUDING AN INSUFFICIENT RECORD BELOW, MILITATE AGAINST REVIEW.

Rule 10, Rules of the Supreme Court, provides that review on a writ of certiorari is a matter of "judicial discretion" and will be granted "only for the most compelling reasons." The present Petition meets none of the Rule's suggested criteria for granting review. No Arizona appellate court "decided an important federal question." The *Aitken* decision does not conflict with decisions of this Court, federal courts or other state courts. Rather, *Aitken* simply applied Arizona law to interpret two Arizona statutes. There is "a weighty presumption against review" where federal claims were not raised or passed on in state court. *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

Furthermore, sound reasons support the rule that review should not be granted unless federal questions were timely

presented below and actually decided by the state court: the record below should be adequately developed; state courts should be afforded the first opportunity to address federal issues; principles of comity require deference to state court decisions; state courts may decide cases based on adequate independent state grounds which do not require analysis of federal issues; this Court's workload should not be unnecessarily expanded. *Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Webb v. Webb*, 451 U.S. 493, 499-501 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Each reason favors denial of the writ in this case. The record below was only scantily developed regarding federal issues. They were never fully briefed or argued. They are not addressed or decided in the opinion. If federal issues had been timely presented, Arizona courts might have addressed the state constitutional issues which they did not reach in *Aitken*. The only facts in the record below establish that Petitioners had both actual and formal notice of the third-party action and could have been heard in that action. Petitioners presented no countering facts. The scant record below suggests no genuine present federal issue. Further, the Supreme Court of Arizona decided this case purely on adequate state grounds; Petitioners' failure to raise timely federal issues precluded Arizona courts from fully addressing and deciding the federal claims now set forth in the Petition. This Court need not take on a case where the record is undeveloped and no federal issues are implicated.

Petitioners contend that certiorari should be granted because *Aitken* will have broad-ranging, deleterious effects in other pending cases. For example, Petitioners complain: "In trials to the court, judges can attribute as much fault to the employer as they desire in attempts to protect the worker's recovery from the lien (of A.R.S. § 23-1023)." (Petition, p. 16.) The Supreme Court of Arizona dispelled such concerns in its

recent decision in *Grijalva v. Arizona State Compensation Fund*, __ Ariz. __, __ P.2d __, 212 Ariz.Adv.Rep. 33 (Supreme Court No. CV-93-0329-PR, decided March 19, 1996). There, the court refused to extend *Aitken* to a "summary court trial" where the judge entered an order which served the sole purpose of defeating the carrier's right of reimbursement pursuant to a "contrived" settlement. The court distinguished *Aitken* which involved "a contested third party trial that necessitated a (jury's) determination of liability and damages, including the apportionment of fault among parties and non-parties as required by law." *Id.* As *Grijalva* shows, the appellate courts of Arizona can adequately control the scope and effect of their own decisions.

Finally, Rule 14 (1)(g)(i), Rules of the Supreme Court, requires a statement of the case which establishes when and how federal issues were raised below both in the first instance and in Arizona's appellate courts. It also requires a statement of "the way in which they were passed on by those courts." Here, no federal issue was raised until the *Aitken* opinion had issued. No Arizona court ever considered, decided or "passed on" a federal issue. For these reasons, this Court should deny the Petition for Writ of Certiorari.

III.

PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED.

Prior to 1988, joint and several liability law controlled an injured worker's negligence action against a third-party tortfeasor in Arizona. Comparative negligence did not apply. If a jury awarded damages to an injured worker, the worker could recover 100% of her damages from *any* negligent third party (regardless of the fault of other persons who were or were not

parties). If the worker had also recovered worker's compensation benefits, she would then repay to the worker's compensation insurance carrier the amount of benefits received. This payment was made pursuant to A.R.S. § 23-1023.[3]

But in 1988, Arizona abolished joint and several liability and adopted A.R.S. § 12-2506, a comparative negligence/several liability statute under which a jury apportions fault to non-parties-at-fault as well as to parties, and each party at fault pays only that percentage of the total damages which the jury attributes to it. The issue decided in *Aitken* was the effect that Arizona's adoption of comparative negligence/several liability (A.R.S. § 12-2506) had on an insurer's recoupment of worker's compensation benefits previously paid (A.R.S. § 23-1023). The Supreme Court of Arizona decided that the amount and timing of an injured worker's reimbursement obligation to the worker's compensation carrier as described in A.R.S. § 23-1023 was subject to the apportionment of fault as determined by the jury under A.R.S. § 12-2506. The net effect of A.R.S. § 12-2506 was that an injured worker's obligation to repay a worker's compensation carrier arose only to the extent that the amount of worker's compensation benefits actually paid exceeded the amount by which the worker's damages were reduced for her employer's negligence.[4]

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3. For example, assume an injured worker received $10,000 in worker's compensation benefits. Further assume a jury verdict against a third party in the amount of $50,000. Regardless of the worker's employer's fault, the worker would receive the full $50,000 from the third party and would then repay $10,000 to the worker's compensation carrier.

4. Assume the same facts as above: $10,000 in compensation benefits paid, and $50,000 in total damages; but, further assume that under comparative negligence, the jury apportioned 60% fault to the third party and 40% fault to the non-party employer. Under several liability, the injured worker would recover only $30,000 (*i.e.*, 60% of $50,000) from the third party.

(Cont'd)

Petitioners claim that this ruling deprived them of property without due process because Petitioners were not parties who actually litigated the employer's fault in the third-party action. Petitioners are wrong. First, Petitioners had actual notice of and an opportunity to participate in the third-party action. Secondly, the Supreme Court of Arizona's decision in *Aitken* did not "deprive" Petitioners of any "property" protected by the due process clause.

A. Petitioners Had Actual Notice of the Third-Party Action and an Opportunity to Participate and Protect Their Interests.

Petitioners complain that they were not parties to the third-party action where the jury determined that Respondent's employer was 25% at fault with a consequent $79,823 reduction of Respondent's recoverable damages. But the *only* facts in the record below establish: (1) that Petitioners had actual notice of the third-party suit at least 11 months before the third-party case was tried; (2) that Petitioners affirmatively attempted to use the third-party action to attack Respondent's credibility and thereby reduce her worker's compensation benefits; and (3) Respondent filed a formal notice of the third-party action in the Industrial Commission of Arizona approximately six months before the third-party trial. The *undisputed facts* are that Petitioners had

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(Cont'd)
Her actual recoverable damages would be reduced by $20,000 (*i.e.*, 40% of $50,000) for fault attributable to her employer. In *Aitken*, the Supreme Court of Arizona decided that a worker's obligation to reimburse a carrier under A.R.S. § 23-1023 existed only when and to the extent that the worker had received compensation benefits in excess of the amount by which her judgment was reduced for an employer's fault. In this hypothetical, for example, there would be no reimbursement to the worker's compensation carrier because the amount of worker's compensation benefits paid ($10,000) did not exceed the amount by which the recoverable damages were reduced ($20,000) for the employer's fault.

both actual and formal legal notice of the third-party action almost one year before it was tried.

Under Arizona law, Petitioners could have intervened in the third-party action to protect their rights. *State ex rel. Industrial Commission v. Reese*, 74 Ariz. 425, 250 P.2d 1001 (1952); *State ex rel. Industrial Commission v. Pressley*, 74 Ariz. 412, 250 P.2d 992 (1952) (worker's compensation carrier may intervene to protect lien and reimbursement rights). Further, the worker's compensation insurance carrier's rights are in the nature of subrogation. *Chevron Chemical Company v. Superior Court*, 131 Ariz. 431, 641 P.2d 1275 (1982). Subrogated insurers have frequently intervened in third-party cases to protect their rights of reimbursement. *E.g., United Pacific/Reliance Insurance v. Kelley*, 127 Ariz. 87, 618 P.2d 257 (App. 1980). Petitioners also knew that comparative negligence/several liability law applied to the third-party claim and that the jury in Respondent's third-party case would apportion fault among parties and non-parties, including Respondent's employer. Petitioners advanced no opposing law below. Petitioners did not intervene below. Therefore, the *undisputed law* in this case is that Petitioners had actual notice and the opportunity to be heard by the jury which attributed fault to the employer in this case.

The fundamental principle of procedural due process is that a person is entitled to notice and an opportunity to be heard before he is deprived of his property. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944). In the present case, the *undisputed* facts establish that Petitioners had actual notice of the third-party action at least 11 months before it was tried. The *undisputed* law of Arizona is that Petitioners could have participated in the third-party action to protect their interests. Therefore, Petitioners had full, legally binding notice and a meaningful opportunity to be heard. But Petitioners did not avail themselves of that opportunity.

Petitioners did nothing to protect their interests. Due process is not violated where an adverse decision "stems from a party's own failure to avail itself of its opportunity to be heard." *Weinco, Inc. v. Katahn Associates Inc.*, 965 F.2d 565 (7th Cir. 1992).

Petitioners' participation in the third-party lawsuit was not only a sufficient procedure, but was the best procedure under all of the circumstances. In determining the adequacy of a particular procedure, this Court applies a flexible standard which accommodates the competing interests involved, including: (1) the importance of the private interests and the length and finality of the deprivation; (2) the likelihood of governmental error; and (3) the magnitude of governmental interests involved. *Logan v. Zimmermann Brush Company*, 455 U.S. 422, 434 (1982). In light of these factors, due process tolerates variances in the form of the hearing required. *Fuentes, supra*, 407 U.S. at 82.

Applying these considerations to the present case, Petitioners' opportunity to participate in the third-party action where the jury determined the employer's fault was the best, most meaningful procedure available. Regarding the first consideration, Petitioners were not "deprived" of "property" protected by the due process clause. (*See* pp. 19-22, *infra*.) If any "deprivation" occurred, it was not "final" but was merely conditioned on the amount of worker's compensation benefits actually paid. With respect to the second factor, the third-party action where the jury apportioned fault was least likely to cause governmental error. The jury system is long-established and constitutionally protected. If Petitioners had participated, it would avoid any possible error resulting from an inconsistent determination of fault in a separate proceeding.

Finally, regarding the third factor, Arizona had a very serious governmental interest in establishing and fashioning its

own rules of tort law. *See Logan, supra*, 455 U.S. at 433, citing to *Martinez v. California*, 444 U.S. 277, 282 (1980). Arizona's adoption of comparative negligence/several liability was a major change from joint and several liability law which had existed during the entire time that Arizona was a territory or state of the United States. Further, affording equal treatment and protection of the law to all classes of citizens, while not creating special privileged classes, is a constitutionally embedded Arizona state priority. *Ontiveros v. Borak*, 136 Ariz. 500, 512, 667 P.2d 200, 212 (1983). A strong governmental interest therefore exists to ensure that Arizona's new comparative negligence/several liability scheme is equally applied to all citizens and that "special classes of litigants" (*e.g.*, worker's compensation insurance carriers) do not avoid its effect. During the period after Arizona's adoption of A.R.S. § 12-2506, *all* personal injury litigants lived with uncertainty as to the meaning, effect and operation of comparative negligence/several liability law. Worker's compensation carriers cannot be treated as a special class which is privileged or immune from the operation of that new law. Considering all of these factors, therefore, Petitioners' opportunity to participate in the third-party action where the employer's fault was determined was not only an available, sufficient procedure, but was the best, most reasonable procedure under all of the circumstances. Petitioners had full notice and an opportunity to be heard.

B. Petitioners Were Not "Deprived" of "Property" Protected by the Due Process Clause.

Any due process analysis necessarily involves a determination of whether an interest is "property" within the protection of the due process clause. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Due process protects interests that a person has *already acquired* in specific benefits. *Id.* 408 U.S. at 576. A mere "unilateral expectation" is not enough to trigger due

process analysis; rather the person must have a legitimate existing claim of entitlement to property. *Id.* 408 U.S. at 577; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). As applied to statutorily created interests, a "vested interest" in a statutorily created right is protected by the due process clause; but where a statutory change occurs to eliminate or reduce that interest and where a claimant has not obtained a *vested* interest prior to the change, the new law does not deprive the claimant of property without due process. *Sperry and Hutchinson v. Rhodes*, 220 U.S. 502, 505 (1911); *Emblen v. Lincoln Land Company*, 184 U.S. 660, 662-64 (1902).

In the present case, Petitioners were not deprived of "property" protected by the due process clause. Petitioners' interests in the proceeds of the third-party action did not vest until 1990 when Respondent actually recovered monies from the third party. Petitioners' rights were determined under Arizona's comparative negligence/several liability law as it existed in 1990, not as it formerly existed under joint and several liability law before 1988. Petitioners may have had a "subjective expectation" that the former law would apply, but that interest was a mere "unilateral (and erroneous) expectation" not protected by the due process clause.

When Petitioners' interest actually vested in 1990, A.R.S. § 12-2506 had already been enacted. Petitioners' rights therefore cannot be determined (as Petitioners would like) simply based on the pre-1988 manner in which A.R.S. § 23-1023 was construed. Rather, Petitioners' "property" interests must be determined by considering A.R.S. § 23-1023 in light of the more recently enacted A.R.S. § 12-2506. That construction and determination of Petitioners' "property rights" is precisely what the Supreme Court of Arizona decided in *Aitken*: construing A.R.S. § 23-1023 in light of A.R.S. § 12-2506, Petitioners' right of reimbursement arises only when and to the extent Petitioners have paid out more

in worker's compensation benefits than Respondent has lost for her employer's negligence. Petitioners might have recovered more under the former law, but that law had changed before Petitioners' interests vested. Petitioners' expectation that they would recover more under pre-1988 law is not protected by the due process clause.

Petitioners attempt to circumvent this rule by treating the *Aitken* decision in itself as a "change in the law" which occurred in 1995. Petitioners are wrong. *Aitken* merely interpreted how the Arizona Legislature had already altered the law in 1988, before Respondent was even injured. Further, a state court decision relying on state law which involves ownership of property does not "deprive" a person of property simply because it denies that claimant a right to the property. *Tracy v. Ginzberg*, 205 U.S. 170, 177-178 (1907). If Petitioners' position were correct, any state adjudication of property rights would give rise to a due process claim and review by this Court. *Id.* 205 U.S. at 178. The Arizona Legislature's 1988 adoption of comparative negligence/several liability altered a worker's compensation carrier's reimbursement rights. The Supreme Court of Arizona's *Aitken* decision in 1995 merely clarified what the legislature had already done.

Further, Petitioners have not suffered "deprivation" of their property. Even after A.R.S. § 12-2506 and *Aitken*, Petitioners still have their lien and right of reimbursement under A.R.S. § 23-1023. *Aitken* merely clarified when that right arises. *Aitken* held that after the adoption of comparative negligence/several liability, Petitioners' right of reimbursement only arises when Petitioners have paid more in worker's compensation benefits than Respondent's recoverable damages were reduced for her employer's negligence. *Aitken* clarifies *when* Petitioners receive reimbursement. It does not finally "deprive" them of that recoupment.

For these reasons, the *Aitken* decision did not "deprive" Petitioners of "property" protected by the due process clause.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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-and-

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Attorneys for Respondent

APPENDIX A — PORTIONS OF TRANSCRIPT OF HEARING BEFORE INDUSTRIAL COMMISSION OF ARIZONA ON MAY 18, 1989 (PAGES 1-2, 45-47)

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ICA Claim No.
374-78-9448

Ins. Carrier No.
A065140

DOI: 5/18/89

FAITH AITKEN,

Applicant;

v.

AMPHITHEATER PUBLIC SCHOOLS,

Defendant Employer;

UNIGARD INSURANCE COMPANY,

Defendant Ins. Carrier.

BEFORE: Jerry C. Schmidt, Administrative Law Judge

2675 East Broadway, Room 102
Tucson, Arizona 85716
May 12, 1989, 9:00 a.m.

Appendix A

APPEARANCES:

For the Applicant:
Arthur V. Gage

For the Defendant Employer:
J. Michael Moeller

For the Defendant Insurance Carrier:
J. Michael Moeller

TRANSCRIPT OF PROCEEDINGS

Reported by: Steven J. Haight

[2] INDEX

WITNESS

FAITH ANGELINE AITKIN

Direct Examination by Mr. Gage 3
Cross-Examination by Mr. Moeller 11
Redirect Examination by Mr. Gage 18

BRUCE D. BINGHAM, M.D.

Direct Examination by Mr. Moeller 19
Cross-Examination by Mr. Gage 27

DR. JENNY FOLEY

Direct Examination by Mr. Gage 31
Cross-Examination by Mr. Moeller 40

Appendix A

* * *

[45] THE COURT: Rephrase your question.

BY MR. MOELLER:

Q. You're saying that she still has actual pain attributed to this accident?

A. Pain is what people perceive. This woman still perceives that she has pain.

Q. I'm asking you physically, do you believe she physically has pain attributed to this accident or is it psychological?

A. See, I'm not an M.D. so I would not be qualified to answer that question.

Q. So let's assume that since you're not an M.D. that the M.D.s all say that the pain that she has cannot be explained as a result of this accident?

A. Okay.

Q. It is not attributable to this accident any more, okay?

A. Okay.

Q. Physically. So the only conclusion has to be — your conclusion has to be she's got some kind of psychological pain, not physical, psychological, attributable to this accident, right? It's not real?

A. That's probably a lay person's way to formulate it, yes.

Q. All right. And you don't see any secondary [46] gain in the fact that you're here in this litigation and she's got another lawsuit against someone else to collect money for this?

MR. GAGE: And has to pay back to the carrier if she recovers anything.

MR. MOELLER: Wait a minute, he is under oath?

I object to that.

THE COURT: What is your objection?

MR. MOELLER: I object to his making comments when there is no question before him as a witness. He is not under oath and it's not an objection.

THE COURT: Can you answer the question, Doctor?

THE WITNESS: I don't know the legal system at all, but I do work with people. Like I say, I have worked with a lot of people through the VA through disability, so I am real familiar with the concept of secondary gain and this is not a woman that I see motivated by secondary gain.

BY MR. MOELLER:

Q. Are you aware that she is involved in a lawsuit?

A. Yes, I am.

[47] Q. And aware that she is involved in this claim?

A. Yes, I was, but just because somebody is involved in a lawsuit doesn't mean that we can conclude that there is secondary gain. There are lots of reasons that people file lawsuits.

BY MR. MOELLER:

Q. Sure. Any others besides getting money?

A. I think lots of times it's a matter of self-esteem, pride, trying to do right by a system.

Q. In her case do you think she's filed this lawsuit to do right by the system?

A. I feel from her perspective she was cutoff by workmans' compensation. She felt very hurt, betrayed by that and I think that's what precipitated the lawsuit.

Q. In your review of the medical records in this case, after October of 1988, have you seen any doctor who has found one singie thing wrong with her that could be treated physically?

A. Well, they're sure trying. I have talked to Fran and I have talked to Doctor McCarthy and they have said that it could be a lumbosacral strain and that's real hard to measure physically. It's a problem with back pain.

APPENDIX B — RESPONDENT FAITH AITKEN'S NOTICE REGARDING THIRD-PARTY ACTION, DATED NOVEMBER 22, 1989, AND FILED IN THE INDUSTRIAL COMMISSION OF ARIZONA NOVEMBER 29, 1989

LAW OFFICES
ROBERT Q. HOYT, P.C.
Please reply to:
3507 NORTH CAMPBELL, SUITE 101
TUCSON, ARIZONA 85719
(602) 327-6801

ROBERT Q. HOYT

CHARLES M. WILMER, JR.

TO WHOM IT MAY CONCERN:

This office represents Faith Aitken in a third-party cause, *Aitken vs. Maya Construction,* Pima County Superior Court Number 254878. I hereby authorize a representative of the firm of Robert Q. Hoyt, P.C., to review all records of the Industrial Commission including transcripts of the hearings involving Faith Aitken's Industrial claim.

s/ Faith A. Aitken
FAITH AITKEN
November 22, 1989

APPENDIX C — RESPONDENT FAITH AITKEN'S OPENING BRIEF IN THE ARIZONA COURT OF APPEALS, DATED DECEMBER 16, 1991, STATEMENT OF ISSUES PRESENTED, PAGE 4

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

NO. 2 CA-IC 91-0042

ICA CLAIM NO. 374-78-9448

CARRIER NO. A065140

FAITH AITKEN,

Petitioner,

v.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Appendix C

PETITIONER'S OPENING BRIEF

GERALD T. BARTON
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ARTHUR V. GAGE
Dee-Dee Samet, P.C.
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(602) 624-8595
State Bar No. 009692

Attorneys for Petitioner

Appendix C

[PAGE 4]

ISSUES PRESENTED

I. WHERE AN INJURED WORKER'S DAMAGES IN A THIRD-PARTY SEVERAL LIABILITY ACTION HAVE BEEN REDUCED DUE TO HER EMPLOYER'S NEGLIGENCE, DOES THE EMPLOYER'S WORKER'S COMPENSATION CARRIER HAVE A RIGHT TO FULL REIMBURSEMENT FOR WORKMEN'S COMPENSATION BENEFITS PAID OR IS THE CARRIER REIMBURSED ONLY TO THE EXTENT THAT BENEFITS PAID EXCEED THE EMPLOYER'S PROPORTIONAL SHARE OF DAMAGES?

   A. IN VIEW OF THE ARIZONA SUPREME COURT'S DECISION IN *DIETZ V. GENERAL ELECTRIC*, AND IN VIEW OF PRINCIPLES OF EQUITY AND PUBLIC POLICY, SHOULD A CARRIER'S RIGHT OF REIMBURSEMENT BE REDUCED BY THE AMOUNT OF THE EMPLOYER'S PROPORTIONAL SHARE OF DAMAGES?

   B. DO THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND COMITY REQUIRE COMMENSURATE REDUCTION OF THE CARRIER'S REIMBURSEMENT?

II. DOES A.R.S. § 23-1023 VIOLATE THE NON-ABROGATION AND NON-LIMITATION CLAUSES OF THE ARIZONA CONSTITUTION IF IT IS CONSTRUED TO PERMIT A WORKMEN'S COMPENSATION CARRIER TO RECOVER FULL REIMBURSEMENT OF

Appendix C

BENEFITS PAID FROM AN INJURED PARTY'S DAMAGES WHICH HAVE BEEN REDUCED BECAUSE OF HER EMPLOYER'S FAULT?

III. IN THE ABSENCE OF A DEPENDENT'S CLAIM FOR DEATH BENEFITS, DOES A WORKMEN'S COMPENSATION CARRIER'S RIGHT OF REIMBURSEMENT EXTEND TO A SPOUSE'S LOSS OF CONSORTIUM DAMAGES RECOVERED IN A SEVERAL LIABILITY ACTION?

APPENDIX D — PETITIONERS AMPHITHEATER AND UNIGARD'S ANSWERING BRIEF IN THE ARIZONA COURT OF APPEALS, DATED MARCH 14, 1992, STATEMENT OF ISSUES PRESENTED FOR REVIEW, PAGE 1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NO. 2 CA-IC 91-0042

ICA NO. 374-9448

CARRIER NO. A065140

FAITH AITKEN,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Appendix D

RESPONDENTS' ANSWERING BRIEF

BURY, MOELLER, HUMPHREY & O'MEARA

By s/ J. Michael Moeller
State Bar No. 002432

By s/ Roger W. Frazier
Roger W. Frazier
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(602) 795-8852
State Bar No. 012146
Attorneys for Respondents

Appendix D

[PAGE 1]

ISSUES PRESENTED FOR REVIEW

Respondents acquiesce in the issues chosen by Petitioner for review on appeal.

APPENDIX E — PETITIONERS AMPHITHEATER AND UNIGARD'S RESPONSE TO PETITION FOR REVIEW IN THE SUPREME COURT OF ARIZONA, DATED JULY 15, 1992, STATEMENT OF ISSUES PRESENTED FOR REVIEW, PAGE 2

BURY, MOELLER, HUMPHREY
& O'MEARA
A PROFESSIONAL ASSOCIATION
2606 EAST 10TH STREET
TUCSON, ARIZONA 85716
TELEPHONE: 795-8852

By: J. Michael Moeller, State Bar No. 2432
Roger W. Frazier, State Bar No. 12146
Attorneys for Respondents

IN THE SUPREME COURT
STATE OF ARIZONA

NO. 2 CA-IC 91-0042

ICA NO. 374-9448

CARRIER NO. A065140

FAITH AITKEN,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

Appendix E

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

RESPONSE TO PETITION FOR REVIEW

* * *

[PAGE 2]

III. ISSUES PRESENTED FOR REVIEW

A. DOES THE FINDING OF A PERCENTAGE OF FAULT AGAINST A NON-PARTY EMPLOYER, PURSUANT TO A.R.S. § 12-2506 IN AN EMPLOYEE'S SUIT AGAINST A THIRD PARTY, IS THE EMPLOYER/CARRIER'S LIEN (AND RIGHT OF REIMBURSEMENT) OF ARS. § 23-1023(C) REDUCED BY THE FINDING OF THE NON-PARTY EMPLOYER'S PERCENTAGE OF FAULT?

B. DOES A.R.S. § 23-1023(C) VIOLATE THE ARIZONA CONSTITUTION DESPITE A FULL REIMBURSEMENT TO THE CARRIER WITH NO REDUCTION BASED ON NON-PARTY EMPLOYER'S FAULT IN THIRD-PARTY LAWSUIT?

Appendix E

C. DOES THE CARRIER'S LIEN EXTEND TO SPOUSES RECOVERY FOR LOSS OF CONSORTIUM IN A SEVERAL LIABILITY CASE?

* * *

APPENDIX F — ORDER OF SUPREME COURT OF ARIZONA GRANTING REVIEW ON ISSUES 1 AND 2 ONLY AND SETTING CASE FOR ORAL ARGUMENT DATED JANUARY 13, 1993

SUPREME COURT

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

January 13, 1993

RE: FAITH AITKEN vs. INDUSTRIAL COMM OF AZ/ AMPHITHEATER PUBLIC SCHOOLS, et al
Supreme Court No. CV-92-0257-PR
Court of Appeals No. 2 CA-IC 91-0042
Industrial Commission No. 374-78-9448/Carrier No. A065140

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 12 1993, in regard to the above-referenced cause:

ORDERED: Petition for review = GRANTED on issues 1 and 2 only.

Appendix F

FURTHER ORDERED: The case shall be set for oral argument.

The Clerk of the Court of Appeals, Division Two, Tucson shall forward the remaining record to the Clerk of the Supreme Court.

NOEL K. DESSAINT, Clerk

TO:

Arthur V. Gage, Esq., Dee-Dee Samet, P.C.
Gerald T. Barton, Esq.
Robert Q. Hoyt, Esq., Law Offices of Robert Q. Hoyt
Anita R. Valainis, Esq., Chief Counsel, Industrial Commission of Arizona
J. Michael Moeller, Esq. and Roger W. Frazier, Esq., Bury, Moeller, Humphrey & O'Meara
Hon. Jerry C Schmidt, Administrative Law Judge
Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two
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